ORIGINAL

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

GTE TELEPHONE OPERATING COMPANIES	)	
Tariff F.C.C. No. 1	)	**Transmittal Nos. 873, 874, 893**
	)	
Video Channel Service at	)	**CC Docket No. 94-81**
Cerritos, California	)	

To: The Commission

OPPOSITION TO DIRECT CASE
ON BEHALF OF
APOLLO CABLEVISION, INC.

APOLLO CABLEVISION, INC.

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SUMMARY

The carrier's Direct Case confirms that, as a factual and procedural matter, this is indeed a case of first impression. In the typical circumstance, there are no challenges to (and hence no agency rulings on) first-time tariff filings based on carrier/customer agreements. The parties have either agreed on the tariff contents, or have simply abandoned the arrangement; acceptable tariffs are a quid pro quo for doing the deal. Rather, what Commission rulings have been issued typically involved customers seeking relief from already-approved, effective tariffs, based on conflicting private arrangements.

The circumstances here fit neither profile. In this case, the parties were in accord on a long-term contractual arrangement (1987), the carrier sought and received Commission blessing for a non-tariff implementation of that arrangement (1988), the customer proceeded to plan and operate pursuant to that allowance (1989-94), and only now -- when a tariff is first proposed -- does the dispute arise.

GTE Telephone's essential position is blithely mechanistic: if conflicting contracts do not occupy equal statutory status with tariffs under the Communications Act, Armour Packing dictates that the tariffs must govern. Period.

While the generality may be valid, it is inapplicable here. Apollo does not request that its earlier agreements be afforded a tariff-like status; it contends only that if tariffs are to govern its future relationship with the carrier, those tariffs should reflect the contract terms which the tariff proposes to supplant. None of the cases cited in GTE Telephone's Direct Case, including

Armour Packing itself, dealt with a transition from agency-approved contract arrangements to a tariffed environment. All dealt instead with the efficacy of already-approved, effective tariffs. We are not yet to that stage here.

Moreover, this case doesn't threaten the evils with which Armour Packing was concerned. There was no "secret deal" between Apollo and GTE Telephone; there have been no approved tariff terms on which the public has yet relied; and there is no threat of unreasonable discrimination in the provision of future service -- the question is what the unitary terms governing future service to anyone should be.

GTE Telephone does not dispute that its proposed tariff changes the parties' contract arrangement. Or that it had assured Apollo during negotiations that a contract approach was appropriate. Or that the agreements signed were lawful and binding. Or that the Commission had approved non-tariffed operations in Cerritos. Or that the parties' Cerritos operations have been governed by the agreements for five years. The carrier simply contends that Apollo is bound by the tariff terms as proposed in Transmittal No. 873 without regard to any such matters -- that Armour Packing grants GTE Telephone discretion to do by tariff whatever it likes, irrespective of contractual or regulatory history.

The Direct Case supports no such arrogance. The ultimate question here is whether the proposed tariff is just and reasonable under Section 201(b) of the Communications Act. The principle reflected in Sierra-Mobile confirms that carriers are not free summarily to alter prior lawful contract arrangements -- particularly

where the regulatory agency has specifically approved such arrangements. Aside from Sierra-Mobile cases, the Commission itself has concluded, in requiring carriers to demonstrate "substantial cause" for making changes in tariffed long-term arrangements with customers, that the history and content of the parties' contract arrangements is a necessary part of judging the justness and reasonableness of tariff proposals. The Direct Case efforts to distinguish these principles and precedents are unavailing.

With regard to the applicability of the Commission's "substantial cause" test, the carrier has provided no effective answer. That this is a first-time filing, rather than a tariff revision, is no less an "alteration by tariff" of a prior "long term service arrangement" for which a "substantial cause" showing is required. Failure to have offered any such showing is a fatal deficiency, for which the carrier's oft-asserted "federal mandate" to file tariffs is no excuse.

Finally, the Direct Case further highlights the conspicuously improper effort to abrogate the Maintenance Agreement. Nowhere does the carrier extend its arguments to that agreement, nor does it even assert that such usual arrangements must be tariffed. The unlawfulness of the carrier's efforts to abrogate that agreement by tariff are now beyond dispute.

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Apollo CableVision, Inc. ("Apollo"), by its attorneys, submits herewith its opposition to that portion of the "Direct Case of GTE" filed herein August 15, 1994, relating to Legal Issue 2.

PRELIMINARY STATEMENT

It is important preliminarily to keep clearly in mind what is not at issue in this proceeding. For much of the discussion in GTE Telephone's Direct Case includes gratuitous references either irrelevant to the scope of Legal Issue 2, or plainly inaccurate, or both.

Factually, for example, this proceeding does not involve a circumstance where the public is being provided tariffed services containing one set of terms, and Apollo is seeking different terms for itself based on some undisclosed private arrangement with the carrier. What is involved is seven years of extensive contractual dealings between GTE Telephone and Apollo, a cable franchise issued by the City of Cerritos in 1987 based on the parties' agreements, five years of FCC-authorized operations in Cerritos based on those arrangements, a tariff which (by the carrier's own acknowledgement)

was specifically designed for Apollo's unique requirements but also intended to abrogate the earlier agreements, and no other customers for the tariffed "service."

As to matters of law, whether the service to Apollo is private or common carriage is not at issue here. That subject was addressed at paragraphs 31-33 of the Bureau's July 14, 1994 Order herein, and is now the subject of an Application for Review to the Commission filed by Apollo on August 1, 1994.[1/]

What is at issue is whether, assuming some form of tariff is required, the particular configuration of Transmittal No. 873 is permissible. In its Direct Case, GTE Telephone argues that the Armour Packing[2/] line of cases permits the carrier unfettered discretion in formulating its tariff, because the Commission has no specific procedures for the filing and enforcement of carrier/customer contracts as such. Apollo contends that the principles reflected in the Sierra-Mobile[3/] line of cases, taken together with Commission precedent establishing the "substantial cause" test,

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1/ Throughout its presentation, GTE Telephone repeats its pre-Order position that any furnishing of video channel service is common carriage, and that statute, regulation and precedent therefore require the carrier's relationship with Apollo to be governed by tariff. E.g., Direct Case of GTE at 25-27, 37 & nn. 10, 15. (Citations to the Direct Case hereinafter will appear: "D.C. at _____.") Apollo strongly disagrees with that position, for reasons set forth in its Application for Review, and believes the Commission will ultimately agree with its view. For purposes of this investigation and these pleadings, however, Apollo has assumed that Transmittal No. 873 reflects an appropriate common carrier undertaking, and Apollo will not here reargue its position to the contrary.

2/ Armour Packing Co. v. United States, 209 U.S. 56 (1908).

3/ Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956) ("Sierra"); United Gas Pipe Line Co. v. Mobile Gas Corp., 350 U.S. 332 (1956) ("Mobile").

require that the terms of the proposed tariff be consistent with the parties' negotiated long-term arrangements, in the absence of compelling public interest reasons for any differences.

Ultimately, the Commission, exercising its tariff-review powers, must balance the carrier's right to file tariffs and its obligation to serve all indiscriminately, on the one hand, against an individual customer's right to rely on lawful long-term service agreements negotiated with the carrier, and any injury which would result from an arbitrary abrogation of those agreements, on the other hand. All such considerations are a necessary part of determining the proposed tariff to be just and reasonable under Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). As shown below, GTE Telephone's Direct Case provides no basis here for permitting GTE Telephone to alter by Transmittal No. 873 its agreed-on contractual obligations to Apollo.

ARGUMENT

I. GTE Telephone's Efforts To Distinguish Sierra-Mobile Principles Are Ineffective

In considering the arguments in GTE Telephone's Direct Case, is must be borne clearly in mind that the root determination to be made here is the lawfulness of Transmittal No. 873. While filing carriers specify tariff rates and terms for service in the first instance under Section 203 of the Act, e.g., American Tel. & Tel. Co. v. FCC, 487 F.2d 865, 871 (2d Cir. 1973), such rates, terms and conditions must be just and reasonable, 47 U.S.C. § 201(b). Where, as here, an investigation is commenced under Section 204 of the Act, 47 U.S.C. § 204, the Commission must determine whether the tariff meets the statutory "just and reasonable" standard.

In that context, and as demonstrated below, application of the Sierra-Mobile principle is entirely appropriate, irrespective of the "fact" that the Apollo/GTE Telephone contracts have not been "filed," and do not hold the same regulatory status as tariffs. Similarly, the "substantial cause" test -- another Commission expression of the concerns underlying the Sierra-Mobile cases -- is also squarely applicable. Indeed, the Court of Appeals in Showtime Networks, Inc. v. FCC, 932 F.2d 1, 3 (D.C. Cir. 1991) ("Showtime Networks"), made clear that review of any contract history preceding a tariff filing was wholly appropriate in making a Section 201(b) determination of justness and reasonableness.

A. The carrier misperceives the significance of the Sierra-Mobile holdings

In its Brief (pp. 10-12) Apollo argued that under the principles reflected in the Sierra-Mobile cases -- applied to Communications Act circumstances in Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250 (3d Cir. 1974), cert. denied, 422 U.S. 1026, reh. den., 423 U.S. 886 (1975) ("Bell Telephone") and MCI Telecommunications Corp. v. FCC, 665 F.2d 1300 (D.C. Cir. 1981) ("MCI") -- companies may not use their tariff-filing prerogatives arbitrarily to alter the terms of an existing contractual arrangement with a customer. In varying ways throughout its Direct Case (e.g., D.C. at 26-27, 32-33), GTE Telephone essentially responds that Sierra-Mobile applies only in a regulatory scheme "where privately negotiated contracts may lawfully co-exist" with tariffs. (D.C. at 34.) As confirmation of its view, the carrier notes that the court decisions in Bell Telephone and MCI, and the Commission decisions in United Video, Inc., 49 F.C.C.2d 878 (1974), recon., 55 F.C.C.2d

516 (1975) "(United Video") and Midwestern Relay Company, 59 F.C.C.2d 477 (1976), recon., 69 F.C.C.2d 409 (1978) ("Midwestern Relay"), aff'd sub nom. American Broadcasting Companies, Inc. v. FCC, 643 F.2d 818 (D.C. Cir. 1980 ("ABC"), applied only to carrier/carrier contracts and not to carrier/customer contracts. As with its treatment of Armour Packing (see pp. 9-17, infra), the carrier's superficial literalism ignores the underlying rationale of the Sierra-Mobile holdings, and the Commission's acceptance of that rationale in recent years.

Sierra-Mobile stands for the basic proposition that carriers may not utilize their tariff-filing prerogatives summarily to negate otherwise-binding contractual obligations. Under the facts of those seminal cases, the Supreme Court found "no purpose to abrogate private rate contracts as such" in the particular statutes involved (the Natural Gas Act, 15 U.S.C. §§ 717, et seq., and the Federal Power Act, 16 U.S.C. §§ 824 et seq.). Mobile, supra note 3, 350 U.S. at 338; Sierra, supra note 3, 350 U.S. at 353.

As explained in Apollo's Brief, the Commission -- with the court's approval -- has accepted and applied the Sierra-Mobile principle. As to agreements between carriers, the Commission has long made clear it will not permit carriers to use tariff-filing processes to negate contractual obligations.[4/]

[4/] Bell System Tariff Offerings (Docket 19896), 46 F.C.C.2d 413, 432 (1974), aff'd, Bell Telephone, supra:

> Bell cannot supersede, modify or terminate its contracts with Western Union merely by filing tariffs or taking other unilateral action. In light of the court decisions interpreting comparable legislation, it appears that, except as expressly modified by statute, Bell's contractual obligations with Western

(continued...)

More recently, the Commission has extended the same principle to certain agreements between carriers and customers. Mindful of the statutory requirements for nondiscriminatory provision of common carrier services, but recognizing that today's business environment includes negotiated facilities and services arrangements between carriers and users,[5/] the Commission has taken steps to avoid carriers' abuse of their tariff-filing prerogatives. Thus, particularly where carriers have entered into long-term agreements with customers -- arrangements thereafter incorporated into tariff filings -- carriers proposing unilaterally to alter those arrangements must justify such changes. (See discussion, pp. 17-20, infra.) In assessing such justifications, the Commission takes directly into account both the circumstances in which the agreements were reached, and the impact of the carrier's tariff changes on the customer:

> Our statutory responsibilities dictate that we take into account the position of the relying customer in evaluating the reasonableness of the [tariff] change.

[4/](...continued)

> Union are governed by common law and can be changed or modified only in accordance with the procedures set forth in the contracts or the Communications Act . . . [I]t is clear that neither common law nor the Act authorizes Bell unilaterally to alter its contracts with Western Union.

See also MCI, supra, 655 F.2d at 1302 ("the Communications Act of 1934 grants the FCC no authority to authorize unilateral changes in agreements").

[5/] See, e.g., AT&T Communications - Revisions to Tariff F.C.C. No. 12, 4 F.C.C. Rcd. 4932, 4938-39 (1989), aff'd in relevant part, rev'd in part, MCI Telecommunications Corp. v. FCC, 917 F.2d 30 (D.C. Cir. 1990) ("Tariff 12 Appeal"); The Ohio Bell Telephone Company, 1 F.C.C. Rcd. 942 (Com. Car. Bur. 1986); Pacific Bell, 60 R.R.2d 1175 (Com. Car. Bur. 1986), recon. den., 2 F.C.C. Rcd. 265 (1987); The Chesapeake and Potomac Telephone Co., 57 R.R.2d 1003 (1985), recon. den., FCC 85-279 (rel. May 30, 1985).

> . . . In balancing the carrier's right to adjust its tariff in accordance with its business needs and objectives against the legitimate expectations of customers for stability in term arrangements, we conclude that the reasonableness of a proposal to revise material provisions in the middle of a term must hinge to a great extent on the carrier's explanation of the factors necessitating the desired changes at the particular time. If a carrier can make a showing of substantial cause, its decision to alter tariff terms will be considered reasonable. . . . [S]ome sweeping reservation [by the carrier] to unilaterally change any and all terms and conditions of service will not serve to lessen our original concerns.

RCA American Communications, Inc., 86 F.C.C.2d 1197, 1201-02 ("RCA Americom") (footnotes and citations omitted), aff'd, RCA American Communications, Inc. v. FCC, mem. op., D.C. Cir. No. 81-1558 (July 21, 1982).

GTE Telephone's declaration that Sierra-Mobile applies only under a regulatory scheme "where privately negotiated contracts may lawfully co-exist with [a] filed tariff" (D.C. at 34) ignores both the principle underlying Sierra-Mobile and the Commission's acceptance of that principle. If, as in Bell System Tariff Offerings, supra note 4, the pre-existing contract between carrier and customer is legitimate, the carrier cannot alter the terms of the contract unilaterally by filing a tariff containing different provisions without at least a compelling public interest justification for doing so.

B. Other cases cited by GTE Telephone are not controlling here

GTE Telephone principally focuses on dicta in the Bell Telephone case, supra, where the court observed that "a communications carrier may . . . be prohibited from contracting with customer-users" in the course of finding intercarrier agreements consistent

with the Communications Act, 503 F.2d at 1276. (E.g., D.C. at 34.) Citing the Commission's references to that wording in United Video and Midwestern Relay, supra, the carrier concludes that while Sierra-Mobile may extend to intercarrier agreements, it is inapplicable to carrier/customer agreements. (D.C. at 34-35.) Further, the MCI decision, supra, is said to be "consistent" with a limitation of the Sierra-Mobile holding to intercarrier agreements. (D.C. at 35.)

As noted, the Bell Telephone court did not hold that carrier/customer contracts are inconsistent with the Communications Act. Indeed, the rationale of the Bell Telephone holding is equally applicable to carrier/customer agreements. For at bottom, the court endorsed the notion that a carrier's ability to abrogate common law contracts by tariff should be strictly circumscribed:

> We have recognized that "a statute should not be considered in derogation of the common law unless it expressly so states or the result is imperatively required from the nature of the enactment." . . . The Communications Act contains no express statement of an intention to authorize the unilateral modification or abrogation of privately negotiated contracts. Nor do the various provisions of the Act "imperatively require" that we imply such authorization.

503 F.2d at 1280 (citations omitted).[6/]

[6/] The Court cited, among other things, the Supreme Court's decision in Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 437 (1907), where the Court wrote:

> [A] statute will not be construed as taking away a commonlaw right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it is to be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory.

The Commission itself has eschewed GTE Telephone's view that Bell Telephone ruled carrier/customer agreements inconsistent with the Communications Act. In Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (Further Notice of Proposed Rulemaking), 84 F.C.C.2d 445, 481-82 (1981) ("Competitive Carrier Rulemaking"), the Commission observed:

> The touchstone of the Bell decision was the court's finding that the Act clearly contemplated the use of either contracts or tariffs between carriers. We believe the Act contemplates the use of contracts for non-carrier customers as well.
>
> . . . [T]he Act . . . establishes that contracts between carriers and customers are contemplated and that as long as such contracts fulfill the express commands of the statute (e.g., the reasonableness of rates), such contracts are permissible.

None of the other authorities cited by GTE Telephone with respect to Sierra-Mobile, many of which are dealt with below, even vaguely supports the notion that the fact and content of carrier/customer contracts may not be considered in the Act's tariff-approval process.[7/]

[7/] In perhaps its most presumptuous (and unexplained) reach, GTE Telephone also cites the Supreme Court's recent decision in MCI Telecommunications Corp. v. American Tel. & Tel. Co., 114 S.Ct. 2223 (1994), in support of the inapplicability of Sierra-Mobile. (D.C. at 33.) That decision -- which overturned the Commission's forbearance from requiring tariff filings in certain circumstances -- has no relevance whatever in this proceeding. Apollo does not here argue that a tariff must not be filed; that matter, in the differing context of private-versus-common carriage issues, is being addressed in Apollo's Application for Review to the Commission. Rather, it is what the tariff filed must contain before it becomes effective that is at issue here.

II. GTE Telephone's Reliance on Armour Packing Cases is Misplaced

GTE Telephone basically contends that while Sierra-Mobile might apply if the contracts at issue were between carriers, Armour Packing is the proper precedent here, given that the agreements are between a carrier and a customer. Because the type of service at issue must be provided by tariff, and since "private contracts are statutorily impermissible" (D.C. at 25), the carrier argues, Armour Packing requires that the terms of a tariff must prevail over any inconsistent terms of a private contract (e.g., D.C. at 25-26, 36-37).

A. The Armour Packing holding itself is inapplicable

Preliminarily, it should be emphasized again that GTE Telephone's essential predicate is wrong. As indicated above, private carrier/customer contracts are not per se "statutorily impermissible" under the Communications Act.[8/] Moreover, the Commission has recognized that in various areas of telecommunications service, negotiated carrier/customer agreements are entirely appropriate,

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[8/] See, e.g., Competitive Carrier Rulemaking, supra, at 482:

> In light of the breadth of Sections 211 and 219 [of the Communications Act], we can find nothing in the statutory language that actually precludes the use of carrier-customer contracts.

And see Tariff 12 Appeal, supra note 5, 917 F.2d 38:

> [R]ates arrived at through negotiations between a carrier and an individual customer and then made generally available to other similarly situated customers do not per se violate the Communications Act if the rates are filed with the FCC.

and that tariffs reflecting such agreements are indeed "permissible" under the Act.[9/]

In this case, the contractual relationships between Apollo and GTE Telephone, specifically approved by the Commission in 1989,[10/] were certainly "permissible." Even GTE Telephone would not claim that its contract arrangements with Apollo since 1987 have been unlawful.

What would be "impermissible" would be the preference of an undisclosed private agreement inconsistent with already-approved tariffs pursuant to the terms of which service was being provided to others. And it is that circumstance Armour Packing, supra note 2, ruled improper. As the very quote relied on by GTE Telephone (D.C. at 29) shows, Armour Packing sought to prevent "secret alteration[s] by special agreement" of published tariff terms provided to others. 209 U.S. at 81. When service rates and practices

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[9/] See, e.g., Tariff 12 Appeal, supra note 5, 917 F.2d at 38 ("there is no procedural bar to a carrier's formulating a proposed tariff based upon negotiations with a potential customer") (emphasis omitted); Competition in the Interstate Interexchange Marketplace, 6 F.C.C. Rcd. 5880, 5902-03 (1991) ("Docket 90-132"):

> Section 203(a) requires that AT&T file "schedules" showing its charges, classifications, practices, and regulations affecting its charges . . . . Requiring AT&T to provide Section 203 information in the form of a contract-based tariff is clearly within our permissible discretion under this provision. Indeed, the United States Court of Appeals for the District of Columbia Circuit has held that the Communications Act permits the filing of contract-based tariffs.

Id. (citing Tariff 12 Appeal, supra note 5, 917 F.2d at 37-38; Sea-Land Service, Inc. v. ICC, 738 F.2d 1311, 1318 n. 11 (D.C. Cir. 1984) ("Sea-Land").

[10/] General Telephone Company of California, 4 F.C.C. Rcd. 5693 (1989) ("GTE").

have been established through the statutory tariff-filing and review process, carriers are not permitted to reach off-tariff agreements with individual customers at odds with the published terms. None of the parties here disputes the Communications Act's intention to have the tariff process insure nondiscrimination in the provision of common carrier service.

We are not dealing with "existing" tariff rates and practices in this case, however. And Apollo is not demanding a parallel but different contract arrangement if tariffs are legally required. This is an initial tariff filing, the propriety of which is being tested in this proceeding, and the contents of which have yet to be found just and reasonable. Moreover, notwithstanding the charade of Transmittal No. 893, the terms of Transmittal No. 873 are not practically available to (and will never be accepted by) any other party. None of the evils which Armour Packing sought to obviate, therefore, is present here.

Contrary to GTE Telephone's suggestion, therefore, Armour Packing is not a mechanistic inquiry into whether the private contracts between Apollo and GTE Telephone are "permitted to be filed" under the Communications Act.[11/] The underlying purpose of that decision was to assure that the non-discriminatory provision of published arrangements in approved tariffs is not undermined by undisclosed side-deals with individual customers. There are no such concerns here, and even GTE Telephone does not claim other-

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[11/] Indeed, the court in the Tariff 12 Appeal, supra note 5, has dismissed just that crabbed view, in terms particularly apt: "What is involved here is not the filing of contracts qua contracts but the filing of tariffs based upon contracts." 917 F.2d at 38 (emphasis in original).

wise. The strictures of Armour Packing are simply inapplicable in this instance.

B. Other Armour Packing-related cases cited by the carrier are clearly distinguishable

In its Direct Case (at pp. 31-32), GTE Telephone cites a series of decisions where Armour Packing is said to have been applied to Communications Act-regulated activities, and includes descriptive squibs suggesting their reliance. Midwestern Relay, supra; Marco Supply Co. v. AT&T Communications, 875 F.2d 434 (4th Cir. 1989); Public Broadcasting Service, et al., 63 F.C.C.2d 707, 723 (1977); Cruces Cable Company, Inc., et al., 35 F.C.C.2d 707, 708 (1972). Moreover, this case is said to be "identical . . . in all pertinent respects" to United Video, supra. (D.C. at 27.) All decisions cited, however, are readily distinguishable.

With respect to United Video, GTE Telephone's claim exceeds hyperbole. In that case, the carrier sought to revise a long-standing tariff rate structure for signal delivery to certain cable systems in Illinois and Iowa. One of the affected carriers objected, claiming that the resulting increased rates would breach its contract with the carrier three years earlier, which specified a lower rate for a 10-year period. 49 F.C.C.2d at 879. The Commission found, however, that the agreement relied on specifically accepted the tariff as governing rates:

> [The customer's] claim that we should reject this tariff because the filed rate increase constitutes a breach of a previously executed contract between it and [the carrier] setting forth a lower rate is without merit since the same contract put [the customer] on notice that the service and rates were governed by the tariff, not the contract.

49 F.C.C.2d at 880.[12/]

Here, there is no comparable provision in the Apollo/GTE Telephone agreements, and the specific contemplation of both parties when the contracts were executed was that the services would be provided by contract, not tariff. Indeed, paragraph 19 of the Lease Agreement specifically expressed the parties' conviction at the time that "the service by [GTE Telephone] under the Agreement is not subject to regulation by the Public Utilities Commission of the State of California (CPUC) or the Title II authority of the Federal Communications Commission (FCC)." (See Apollo Brief filed August 15, 1994, Attachment 8.)

Perhaps GTE Telephone's most disingenuous contention in this regard is that paragraph 19 of the Lease Agreement[13/] contemplated the carrier's action here. The portion of paragraph 19 relied on states:

> If the . . . FCC claim[s] Title II jurisdiction over the service provided by [GTE Telephone], [Apollo] shall be subject to the rates, terms and conditions such agency may impose.

Apollo Brief, Attachment 8 (emphasis added). From that wording GTE Telephone extrapolates that "Apollo -- by its own concordance -- is subject to the rates, terms and conditions imposed by tariff filed

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[12/] The particular contract provision referred to provided:

> . . . CARRIER and CUSTOMER agree that all service rendered by the CARRIER will be subject to the provisions of its effective Tariff as filed with the Federal Communications Commission. All provisions of this Agreement are to be construed in light of the then-effective Tariff . . . .

49 F.C.C.2d at 879 n.4.

[13/] Significantly, the Maintenance Agreement contained no such provision (see discussion at pp. 22-24, infra.

in accordance with the Act and the Commission's Rules." (D.C. at 28.)

Pure sleight of hand. Being subject to rates, terms and conditions imposed by this agency is hardly equivalent to being subject to whatever tariff rates, terms and conditions GTE Telephone chooses to file. And the question yet to be answered is whether the Commission, at the conclusion of these proceedings, will impose (or approve) any rates, terms and conditions. Particularly given GTE Telephone's presumably-informed assurances to Apollo at the time the Lease Agreement was executed that the service would not be deemed common carriage, and would not have to be tariffed, the carrier's word-weaseling now is unseemly at best.

Concerning the gang citations on pages 31-32 of the Direct Case, none of the decisions referenced is squarely on point, and some are plainly irrelevant. In Midwestern Relay and ABC, supra, for example, the customers' challenge was to proposed revisions of a tariff initially filed and effective some four years earlier. The carrier/customer agreements which were the basis for the filed tariff had included a provision forbidding the carrier from filing any future tariff inconsistent with terms of the contracts. However, the initial tariff -- which became effective with the acquiescence of the customer -- contained no such provision. ABC, 643 F.2d at 819-20. Alluding to Armour Packing, the ABC court found that the initial tariff had not notified the public of the contract restriction, and that that individual contract provision was "just the kind of unpublished contractual alteration of a tariff which the Act condemns." 643 F.2d at 826.

Here, Transmittal No. 873 is not a revision of an existing tariff; it is the first effort at expressing (or changing) by tariff the parties' agreements. No failure to publish, on which third parties or the Commission have had an opportunity to rely, has yet occurred. And acceptance of Apollo's position would not result in a second, different arrangement available to "the public." None of the significant factual underpinnings of the Midwestern Relay and ABC decisions is present here.[14/]

The other decisions cited by GTE Telephone are even less pertinent. In Cruces Cable, supra, the Commission indeed held that the carrier could specify a tariff rate for service other than that contained in an earlier agreement. The parties' contract, however, specifically anticipated a tariff would be filed, but acknowledged that the carrier was only required to use its "best efforts" to establish tariff rates at the contract level. 35 F.C.C.2d at 37-38. The Apollo/GTE Telephone agreements had no such qualifiers.

The pertinence of Marco Supply and PBS, supra, is even more attenuated. Marco Supply, for example, involved a failed civil suit by an AT&T customer based on a disparity between a written quote for installation and monthly charges, and amounts later billed pursuant to a pre-existing tariff. The court held that filed tariffs must prevail over mistaken quotations by AT&T sales representatives, and that the customer is presumed to know that the

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[14/] It should be noted that the Commission subsequently qualified the scope of its Midwestern Relay decision to "the actual holding that an unfiled contract could not alter the terms of a published, effective tariff." Competitive Carrier Rulemaking, supra, 84 F.C.C.2d at 484 n.77.

published tariff rates would govern in any event. 875 F.2d at 435-36.

At issue in the cited portion of PBS was whether, in light of legislation permitting the Corporation for Public Broadcasting to deal by contract with private entities for the distribution and transmission of educational programming to noncommercial educational broadcast stations, Western Union was required to provide satellite transponder service to the Corporation by tariff. 63 F.C.C.2d at 722-23. The Commission ruled that a tariff would be required, since the statute involved specifically eschewed any intention to alter the Section 203 tariff-filing requirements of the Act. Id. at 723.

III. The Direct Case Confirms GTE Telephone's Failure To Meet The "Substantial Cause" Test

A. The claim that "substantial cause" showings are inapplicable to initial tariff filings is plainly wrong

In its Brief (pp. 19-21), Apollo argued that where long-term service arrangements had been arrived at between a carrier and a customer, consistent Commission precedent for more than 10 years requires that a carrier proposing to alter the terms of such arrangements by tariff must make a "showing of substantial cause" to support those revisions. E.g., RCA Americom, supra, 86 F.C.C.2d 1197; Showtime Networks, supra, 932 F.2d 1.

Reduced to its essentials, GTE Telephone's position is that, while its tariff proposal admittedly may indeed "work significant changes" on the earlier Apollo/GTE long term contracts, the "substantial cause" test is inapplicable because Transmittal No. 873 is not modifying "an existing long term service tariff" (D.C. at 37-

38; emphasis added). It is true, of course, that Transmittal No. 873 is an initial tariff filing, and not an alteration of an earlier-filed tariff. That distinction, however, while consequential for other decisional purposes, does not moot the applicability of the "substantial cause" test here.

It must be remembered that this is not the more usual case where an initial tariff filing is the first regulatory ("published") expression of the parties' negotiated "arrangements," and where both the implementation and economic effect of those "arrangements" occur after the initial tariffs become effective. Rather, the long-term service "arrangements"[15/] between Apollo and GTE Telephone were first established in the parties' various contracts as early as 1987. In its 1988 and 1989 decisions, the Commission was aware of those arrangements, blessed them in granting GTE Telephone Section 214 authority, and specifically recognized that the parties would be operating the Cerritos facilities pursuant to contract, not tariff.[16/] And operating implementation of the Apollo/GTE Telephone "arrangements" has been an historical fact for more than 5 years.

That the carrier proposes to alter certain elements of that long-term "arrangement" in an initial tariff submission, rather than in a revision to an existing tariff, hardly moots the "substantial cause" test as a matter of logic. The contracts -- which

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[15/] See AT&T Communications - Revisions to Tariff F.C.C. No. 2, 5 F.C.C. Rcd. 6777, 6778 (Com. Car. Bur. 1990) ("AT&T"): "The RCA Americom Decisions establish that a carrier must demonstrate substantial cause for changes in long-term service arrangements." (Emphasis added.)

[16/] GTE, supra note 10; General Telephone of California, 3 F.C.C. Rcd. 2317 (Com. Car. Bur. 1988).

established a 15-year economic relationship -- and the proposed tariff are part of the same business continuum. It is the nature and effect of the carrier's proposed change in the course of that continuum that is at issue, not the technical trappings of how the carrier seeks to make that change.

Neither does the rationale behind the "substantial cause" requirement support GTE Telephone's position that it may do whatever it likes since Transmittal No. 873 is the first tariffed expression of an Apollo/GTE Telephone relationship. Where customers have negotiated long-term arrangements with a common carrier, and have established future business plans in the reasonable expectation that the terms agreed on will be honored, the Commission's requirement that carriers justify tariff changes in those terms is specifically intended to take into account both the "customer's legitimate expectation of stability," AT&T, supra note 15, 5 F.C.C. Rcd. at 6778, and any unnecessary dislocations those changes would occasion:

> Our statutory responsibilities dictate that we take into account the position of the relying customer in evaluating the reasonableness of the change[s].

RCA Americom, supra, 86 F.C.C.2d at 1201.[17/]

[17/] See RCA American Communications, Inc., 2 F.C.C. Rcd. 2363, 2367 (1987), recon. den., 3 F.C.C. Rcd. 1184 (1988). See also Showtime Networks, supra, 932 F.2d at 3 (the RCA Court "specifically endorsed a double-faceted FCC check on changes in a long-term service. The Commission, we agreed, could look to the subscriber's side as well as the carrier's"); RCA American Communications, Inc. v. FCC, Nos. 81-1558, 81-1597 (D.C. Cir. July 21, 1982) (slip op. at 4) ("[W]e see no reason why the Commission, in a thoughtful and properly-supported exercise of its expertise, could not decide that substantial customer-reliance expenditures have been induced by a particular type of tariff, and that these should play a significant role in defining the zone of reasonableness within which the carrier is free subsequently to modify its rates and practices").

With the Commission's knowledge and assent, the parties here agreed by contract to operating relationships, with individually tailored economic undertakings, to extend past this decade. The effect of GTE Telephone's effort to alter those arrangements in an initial tariff filing is no different than it would be if the initial arrangement had been embodied in an earlier tariff and the same changes were by way of tariff amendment. Apollo's initial reliance would have been no different or less. And its injury would be equally substantial.

Ultimately, of course, GTE Telephone's quibble that this is an initial, rather than an amending, tariff filing, stands as no obstacle to the Commission's applying the "substantial cause" test. Any tariff submission by a common carrier, whether an initial filing or a later amendment, must meet the "just and reasonable" standard of Section 201(b) of the Communications Act. Summarizing its earlier actions in the RCA Americom cases, the Court in Showtime Networks reconfirmed its acceptance of the "substantial cause" test as an aid in the Commission's ascertaining whether tariffs relating to long-term service arrangements meet the statutory "just and reasonable" standard. Because such a requirement here would not impose any "additional hurdle that [GTE Telephone's] . . . new tariff ha[s] to overcome," RCA Communications, Inc. v. FCC, mem. op. at 5, D.C. Civ. No. 81-1558 (July 21, 1982), the Commission is free -- indeed is required in this instance -- to assess Transmittal No. 873 as the change in long-term arrangements it is.